

NTSB Order No. EA-4955

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of February, 2002

Dockets SE-15135
and SE-15136

In this case the law judge had to determine whether the respondents' en route decision to change their destination airport complied with their obligation under section 121.631(c) of the Federal Aviation Regulations ("FAR"), 14 CFR Part 121,¹

(c) No person may change an original destination or alternate airport that is specified in the original dispatch

not to make such a change unless they had the fuel reserves necessary to divert to the farthest alternate airport specified in their flight plan, in the event a landing at the new destination could not be made when they arrived there.² We will sustain the law judge's decision that they did have sufficient fuel.³

A prior order in this case, NTSB Order No. EA-4866 (November 30, 2000), set forth in detail the Administrator's allegations, which will be only referenced, as necessary, here. Respondents Morris and Wallace on March 3, 1997, were, respectively, the pilot-in-command and first officer of a Boeing 737 aircraft being operated in scheduled air carrier service as USAir Flight 1186 between West Palm Beach, Florida, and New York City, New York.⁴ LaGuardia Airport in New York City was the original destination for the flight, with airports at Hartford, Connecticut, and Albany, New York, listed as alternates. After heavy snow in the

(..continued)

or flight release to another airport while the aircraft is en route unless the other airport is authorized for that type of aircraft and the appropriate requirements of sections 121.593 through 121.661 and 121.173 are met at the time of redispach or amendment of the flight release.

²FAR section 121.639 provides, in pertinent part, that these fuel reserves must include enough fuel to (1) "fly to the airport to which the [airplane] has been dispatched," then (2) "to fly to and land at the most distant alternate airport," and, after arriving at the alternate, (3) "to fly for 45 minutes at normal cruising fuel consumption."

³An excerpt from the hearing transcript containing the initial decision is attached.

⁴Respondent Wallace was operating the controls during the flight. Respondent Morris was handling radio communications.

New York City area precluded a landing at LaGuardia, respondents changed their destination, not to one of their alternates, but to Newark International Airport, New Jersey, another airport at that time experiencing adverse weather.⁵ Before reaching Newark, however, respondents broke off that approach and changed their destination again, this time to Kennedy International Airport, New York, which, like LaGuardia and Newark, was also reporting marginal visibility because of the snowstorm that had moved into the area. Throughout this period, the alternate airports (Hartford and Albany) in respondents' flight plan were reporting ceilings of 10,000 feet or better and ten miles' visibility. The reported visibility at Kennedy just before respondents' decision to divert there was ¼ mile in heavy snow and fog.

As respondents neared Kennedy and learned from Air Traffic Control ("ATC") that there were about a dozen aircraft in line to land ahead of them, they advised that they had "less than minimum fuel," a declaration that ATC treated as an emergency requiring their expedited, priority handling. We issued NTSB Order No. EA-4866 out of concern that respondents' position in this action that they had sufficient fuel reserves to reach their farthest alternate when they diverted to Kennedy was difficult to reconcile with their representations to ATC to the effect that they needed to land right away when they got there because of low fuel. These circumstances suggested, we believed, the

⁵The forecast for Newark just before respondents' decision to divert there was ½ mile visibility in snow and fog. About a half hour later the visibility had dropped to ¼ mile.

possibility that "the respondents can succeed on an appeal to the Board from the Administrator's suspension order only if the evidence shows that they lied to ATC..." (Id. at 7-8). Because of the doubtful propriety of allowing our process to be used in such a context, we requested the parties' comments on "our tentative judgment that the respondents should not be permitted to advance on an appeal to the Board a position that is contrary to information provided to air traffic control in connection with an air carrier operation." Id. at 9.

In their comments, respondents assert that their declaration of less than minimum fuel was not intended to convey an immediate necessity to land, lest they run out of fuel, but, rather, meant no more than that they might not have sufficient fuel to divert to an alternate in the event that, when their turn for landing at Kennedy came, an approach could not be accomplished, for whatever reason. Of course, even if this is what the respondents meant, the lack of enough fuel to divert to an alternate when they were eventually cleared to land at Kennedy would not per se constitute a fuel emergency, for the absence of a full fuel reserve does not automatically establish the existence of a critical fuel situation.⁶ It is certainly possible, of course, that the

⁶The fuel reserves for diverting to an alternate must be on board only when the flight originates or when the original destination is changed (as occurred twice here); the amount of fuel that actually remains when the aircraft arrives at its destination, original or otherwise, may well be less than that estimated at time of release (or destination change), since the aircraft's fuel consumption could have been affected by factors that could not reasonably have been earlier anticipated.

respondents did not understand this when they sought preferential treatment. It also appears likely that the respondents were anxious about what their fuel situation would be in the event they had to wait for eleven or so other aircraft to land ahead of them, and, with two New York City airports already closed to them, were understandably concerned over their prospects for being able to land at Kennedy if the weather worsened. In these circumstances, we are persuaded that even though the respondents did not yet need priority handling based on low fuel when they in effect declared an emergency, they did not in seeking it necessarily intend to misrepresent their contemporaneous fuel situation to ATC.⁷

Based on our review of the record, the initial decision, and the parties' submissions on appeal, we have concluded that the Administrator in her appeal has not identified an adequate basis for disturbing the law judge's determination that the respondents had required fuel reserves when the decisions to change destinations were made.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The initial decision is affirmed.

⁷In fact, the respondents' dialogue with ATC suggests that they wanted priority handling whether or not their fuel situation warranted it, and that ATC suspected as much. When asked by ATC if they were "declaring something other than minimum fuel at this time," respondents, clearly unwilling to accept a number twelve position for landing and a 20-mile final, responded, "if we have to, if we have to get in that's what we'll do." Adm. Exh. 2 at 19.

BLAKEY, Chairman, and HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order. CARMODY, Vice Chairman, and BLACK, Member, did not concur. Vice Chairman CARMODY submitted the following dissenting statement:

I cannot agree with the majority's decision on this case, nor do I understand the decision. I would grant the Administrator's appeal. First, a review of the record shows the law judge's error in concluding that the pilots had adequate fuel reserves for their change of destination, a fact the Board acknowledged in Order EA4866. Second, the pilots' response to EA4866 demonstrates that they did not comply with the regulatory standard.

Their fuel computation unreasonably assumed a direct routing to Kennedy that would require no more than twelve minutes' flying time. Since they knew that the weather in the New York City area was deteriorating and that other pilots may have been unable to land at either Newark or LaGuardia, they were obligated to include in their planning an allowance for the fuel that they would need for a non-direct routing.* I find it incredible that professional pilots could believe that, despite the delays already encountered, they could fly directly to Kennedy (itself at risk for closing for weather) and not take into account the almost certain delay associated with being sequenced to land with other aircraft heading there. The pilots had to know that clearly foreseeable and known circumstances invalidated a fuel estimate which ignored the predictable delays that adverse weather and other traffic were likely to produce. Those circumstances dictated that, if they only had twelve minutes of fuel before reserves would be tapped, they had no legal choice but to abandon the effort to change destinations a second time and, without wasting any more fuel, divert to one of their two clear alternates.

I dissent from the majority in affirming the law judge's decision despite its evidentiary infirmities.

*FAR section 121.647 directed respondents to consider the fuel needed for "(a) [w]ind and other weather conditions forecast. (b) Anticipated traffic delays. (c) One instrument approach and possible missed approach at destination. [and] (d) [a]ny other conditions that may delay landing of the aircraft."